

NAPWHA/HALC submission to the NSWLRC

In response to 'Consent in relation to sexual offences: draft proposals' published October 2019

25th November 2019

1. About NAPWHA

The National Association for People with HIV Australia (NAPWHA) is Australia's peak non-government organisation representing community-based groups of PLHIV across Australia. We provide advocacy, policy, health promotion, effective representation, and outreach on a national level. Our work includes a range of health and education initiatives that promote the highest quality standard of care for HIV-positive people. Our vision is a world where all people with HIV can reach their full potential free from stigma and discrimination.

2. About the HIV/AIDS Legal Centre (HALC)

HALC is a not-for-profit, specialist community legal centre in NSW. HALC provides free and comprehensive legal assistance to people in NSW with HIV or Hepatitis-related legal matters, undertakes Community Legal Education and Law Reform activity in areas relating to HIV and Hepatitis, provides legal training, education and experience to employees and volunteers and liaises and works in partnership with other organisations to achieve these objectives.

3. About this submission

NAPWHA and HALC thank the Commission for the opportunity to comment on the draft proposals.¹ This submission focuses primarily on draft section 61HJ(1)(g), as set out in *Proposal 6.9: Fraudulent Inducement*.

We urge the Commission to further consider the potential impact of draft s 61HJ(1)(g) on people living with HIV/AIDS as well as those living with other sexually-transmissible infections (STIs). We are concerned that the proposal, if enacted, could result in increased criminalisation of people living with HIV, as has been the case in Canada, where a similar legal framework to that proposed by the Commission exists. Such a development could negatively impact efforts to combat HIV in Australia.

Australia is a world leader in HIV prevention, treatment and care. We are well placed to be the first country in the world to virtually eliminate HIV transmission. In part this is because successive Australian governments, over many National and State/Territory HIV Strategies, have adopted the principle of shared responsibility. This principle articulates that both HIV positive and HIV negative people are responsible for preventing HIV transmission and that each party should take responsibility for maintaining their own sexual health without

¹ NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Draft Proposals* (2019).

assuming, or relying on representations made by other parties, as to the presence, absence or likelihood of transmission risk.

Highly effective prevention mechanisms that make the transmission of HIV virtually impossible are universally available to all Australians via Medicare. Making HIV positive people responsible for the sexual health of HIV negative people is not an effective way to prevent HIV transmissions and will undermine Australia's world-leading efforts to end HIV transmissions in Australia.

We support the submissions made by our partner organisation the Sex Workers' Outreach Project to provide for consent to be vitiated in cases of serious fraud against a sex worker,² however we note that fraud is already a criminal offence in NSW carrying a maximum penalty of 10 years' imprisonment,³ and the concerns of sex workers could potentially be addressed by better enforcement of current laws, or by enactment of a specific crime of obtaining sex work services by fraud, rather than by extending the offence of sexual assault.

We also support the submissions made by our partner organisation ACON,⁴ and echo ACON's expressed concerns in relation to the potential impact of the draft section on transgender and nonbinary people. We do not support the extension of the law of sexual assault to incorporate so-called 'gender fraud', which would risk criminalising an already-vulnerable community. We note that cases where gender-nonconforming individuals have been prosecuted for rape have occurred overseas,⁵ and that these cases are both controversial in their impact and troubling for people whose gender identity lies outside the gender binary.⁶

Most importantly, as outlined below, we are deeply concerned that the proposed section will result in increased criminalisation of people living with HIV who either do not disclose their HIV status before sex, or who for whatever reason misrepresent their HIV status. We argue that the appropriate mechanism for management of the risk of sexual transmission of HIV is via education and empowerment of people living with HIV and their partners, and by promoting and sustaining the model of shared responsibility to prevent HIV transmission. The appropriate regulatory framework is a health-based, not criminal justice-based, one.⁷

² Sex Workers Outreach Project, 'Submission CO15 in Response to Consultation Paper 21' (24 January 2019) <<https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Submissions/CO15.pdf>>.

³ *Crimes Act 1900* (NSW) s 192E.

⁴ ACON, 'Submission CO12 in Response to Consultation Paper 21' (1 February 2019) <<https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Submissions/CO12.pdf>>; ACON, 'Response to Draft Proposals on Consent in Relation to Sexual Offences' (18 November 2019).

⁵ *McNally v The Queen* [2013] EWCA (Crim) 1051; *R v Newland* (UK Court of Appeal, 12 October 2016); *People v Sean Clark* [1996] Colo Dist Ct 1994CR003290; *State v Wheatley* [1997] Wash Superior Ct 97-1-50056-6; *State of Israel v Alkobi* [2003] Israel Dist Ct 3341(3).

⁶ Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' [2014] (3) *Criminal Law Review* 207; Alex Sharpe, 'Sexual Intimacy, Gender Variance, and Criminal Law' (2015) 33(4) *Nordic Journal of Human Rights* 380; Alex Sharpe, 'Queering Judgment: The Case of Gender Identity Fraud' (2017) 81(5) *The Journal of Criminal Law* 417 ('Queering Judgment').

⁷ See Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) for a detailed examination of the issues around criminalisation of HIV in Australia.

This approach has been a hallmark of Australia's successful response to HIV for more than 30 years, and risks being undone if people with HIV are placed at risk of prosecution via the Commission's current proposal.

4. Our submission in response to Proposal 6.9

NAPWHA and HALC support the fundamental underpinning of the law of sexual assault as it currently stands: that consent means 'free agreement' and that everyone has the right to decide who they have sex with. Consent should ideally occur in circumstances where the consenting party is uncoerced, educated and informed.

We also support the fundamental right of every person living with HIV to privacy in relation to their HIV status. No one should be placed in a position where they are obligated to disclose the fact that they are living with HIV, especially not when they are taking appropriate precautions to prevent its transmission.

Over our 30-year history, NAPWHA and its member organisations have borne witness to the insidious impact of HIV stigma on our communities. People with HIV who choose to share their HIV status with their partners or prospective partners have all too often faced negative consequences including: being 'outed' to family or community; being shunned or ostracised; being blackmailed; being subjected to verbal abuse; being reported to police or health authorities; and being subjected to physical abuse, violence and, on at least one occasion, homicide.

Various pieces of NSW legislation recognise the potential for discrimination, stigmatisation and personal violence against PLHIV who chose to disclose their status by protecting people from unwanted disclosures. For example, the NSW Anti-Discrimination Act acknowledges the need to protect PLHIV against vilification and discrimination based on their status. The Crimes (Domestic and Personal Violence) Act⁸ recognises the seriousness of harassment relating to a person's HIV status and the NSW Public Health Act provides for automatic closed-court proceedings for offenses under that Act (not taking reasonable precautions to prevent HIV transmission) to maintain HIV status confidentiality.

Overwhelmingly, people who have received an HIV diagnosis quickly make strenuous efforts to ensure they do not pose a risk of infection to their partners.⁹ In 2019, HIV treatments have advanced to the point where there is effectively zero risk of transmission of HIV when treatments are taken.¹⁰ Yet stigma persists and people with HIV remain exposed to its harmful impacts.¹¹

⁸ S.53

⁹ See, eg, Chris Gianacas et al, *Experiences of HIV: The Seroconversion Study Final Report 2007–2015* (The Kirby Institute, UNSW Australia, 2016).

¹⁰ Mark A Boyd et al, 'Sexual Transmission of HIV and the Law: An Australian Medical Consensus Statement' (2016) 205(9) *Medical Journal of Australia* 409; Françoise Barré-Sinoussi et al, 'Expert Consensus Statement on the Science of HIV in the Context of Criminal Law' (2018) 21(7) *Journal of the International AIDS Society* <<https://onlinelibrary.wiley.com/doi/abs/10.1002/jia2.25161>>.

¹¹ Sean Slavin et al, *The HIV Stigma Audit: Community Report* (National Association of People Living With HIV/AIDS, 2012); Sean Slavin, 'Results from the Stigma Audit: A Survey on HIV Stigma in Australia' (2012) 10(1) *HIV Australia* 27 ('Results from the Stigma Audit'); John BF de Wit et al, 'Strange Bedfellows: HIV-Related Stigma Among Gay Men in Australia' in Pranee Liamputtong (ed), *Stigma, Discrimination and Living with HIV/AIDS: A Cross-Cultural Perspective* (Springer

Where HIV transmission occurs in circumstances where the HIV-positive partner acts intentionally or recklessly to transmit HIV, NSW criminal law already provides a mechanism for prosecution for causing grievous bodily harm.¹² Where a person living with HIV fails to take reasonable precautions to prevent transmission of HIV, NSW public health law already provides a mechanism for prosecution.¹³

We do not believe that an expansion of the scope of sexual assault law is justified, insofar as such an expansion of the scope of the law would potentially act to incorporate nondisclosure or misrepresentation of HIV status.

We note that the wording of the draft section is unconstrained as to the scope of vitiating frauds and is inconsistent with the principles of minimal criminalisation and legal certainty. The approach taken by the Commission is, in our view, unacceptably broad. It potentially criminalises an almost unlimited range of fraudulent statements and will widen the scope of the criminal law in an unpredictable, uncontrolled and possibly capricious way.

Given the breadth of its scope, we are concerned that the impact of enforcement of the law will fall most heavily on marginalised and vulnerable communities, including people living with HIV. In particular, we know from the history of HIV criminalisation in Australia that people from minority communities, most notably African diaspora heterosexual men, but also sex workers, transgender people, and people who use drugs, have been the target of criminal sanctions in relation to HIV.¹⁴ We are profoundly concerned that the proposed changes to the law will increase the impact of criminalisation on these groups.

We refer the Commission to the NSW government's 2017 decision to remove nondisclosure of HIV status from the *Public Health Act 2010*.¹⁵ Expanding the scope of sexual assault law in such a way as to effectively re-criminalise nondisclosure of HIV status not only flies in the face of this important and long-advocated-for reform of public policy, it intensifies the impact by in effect moving nondisclosure from public health law to the *Crimes Act*, and classifying it as among the most serious offences known to the law which attract significantly higher and, we would argue, disproportionate penalties.

5. The Canadian experience

We note, with concern, the apparent endorsement of aspects of Canadian sexual assault law in the draft proposals.¹⁶ Canada provides, in our submission, an illustrative example of the problematic and harmful impacts on people living with HIV, and on the HIV response, of

Netherlands, 2013) 289 <https://doi.org/10.1007/978-94-007-6324-1_17>; Lucy Stackpool-Moore et al, 'Policing the Margins: HIV, Crime and Stigma' in *14th Social Research Conference on HIV, Viral Hepatitis and Related Diseases (HHARD)* (2016).

¹² *Crimes Act* (n 3) ss 33, 35. It is emphasised that NAPWHA and HALC oppose the use of the criminal law to criminalise HIV transmission, exposure or nondisclosure, and has consistently argued for a health-based approach to prevention of harm by transmission of HIV.

¹³ *Public Health Act 2010* (NSW) s 79.

¹⁴ Edwin J Bernard and Sally Cameron, *Advancing HIV Justice 3: Growing the Global Movement against HIV Criminalisation* (HIV Justice Network, 2019) 10.

¹⁵ 'Changes to the Public Health Act – Preventing the Spread of Sexually Transmissible Infections - Public Health Legislation' <<https://www.health.nsw.gov.au/phact/Pages/pha-s79.aspx>>; *Public Health Amendment (Review) Act 2017* (NSW).

¹⁶ NSW Law Reform Commission (n 1) [6.49], [6.50].

an expansion of the scope of frauds vitiating consent to include nondisclosure or misrepresentation of HIV status.

For more than 20 years, Canadian courts have upheld the view that nondisclosure of HIV status constitutes a fraud that vitiates consent to sexual intercourse.¹⁷ This is in contrast to other common-law jurisdictions, including Australia, where the scope of vitiating frauds has long been held to be limited to those frauds that misrepresent the identity of the sexual partner, and those that misrepresent the nature of the sexual act.¹⁸ Canadian experts and activists have long criticised this interpretation of the law.¹⁹ A landmark consensus statement was published in 2014 by Canadian medical and scientific experts criticising the unscientific basis of the law.²⁰ More recently, the Canadian government has acknowledged the problematic impact of the law, and issued a directive to federal prosecutors that people with HIV should not be prosecuted in most cases.²¹ Notwithstanding this, people with HIV remain subject to prosecution in Canada's provinces.²²

Criminal prosecution of people with HIV for transmission, exposure or nondisclosure of HIV has been shown to increase risk-taking behaviour by people who have not been diagnosed with HIV, and to decrease engagement in testing, treatment and care.²³ Increased criminalisation of people with HIV is likely to have negative impacts on the HIV response in NSW, at precisely the time when the positive impacts of improved treatment and prevention technologies are being realised.

We note with approval that the Commission's Taskforce acknowledged the potential public health impacts of a broad approach to vitiating fraud on the HIV response,²⁴ however we are troubled by the lack of further engagement with this important issue in the *Draft Proposals*.

¹⁷ *R v Cuerrier* (1998) 2 SCR C 25738, 371; *R v Mabior* [2012] 2 SCR 584.

¹⁸ In Australia, the leading case is *Papadimitropoulos v The Queen* (1957) 98 CLR 249; For a detailed exploration of the topic in the Australian legal context, see eg Jonathan Crowe, 'Fraud and Consent in Australian Rape Law' (2014) 38 *Crim LJ* 236.

¹⁹ Canadian HIV/AIDS Legal Network, *The Criminalization of HIV Nondisclosure in Canada: Current Status + the Need for Change* (Canadian HIV/AIDS Legal Network, 2019) <<http://www.aidslaw.ca/site/the-criminalization-of-hiv-non-disclosure-in-canada-report/?lang=en>>.

²⁰ Mona Loutfy et al, 'Canadian Consensus Statement on HIV and Its Transmission in the Context of Criminal Law' (2014) 25(3) *Canadian Journal of Infectious Diseases & Medical Microbiology* 135; Cécile Kazatchkine, Edwin Bernard and Patrick Eba, 'Ending Overly Broad HIV Criminalization: Canadian Scientists and Clinicians Stand for Justice' (2015) 18(1) *Journal of the International AIDS Society* <<http://www.jiasociety.org/index.php/jias/article/view/20126>> ('Ending Overly Broad HIV Criminalization').

²¹ Government of Canada, Office of the Director of Public Prosecutions, 'HIV Non-Disclosure Directive', (2018) 152(49) *Canada Government Gazette* <<http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html#n14>>.

²² Canadian HIV/AIDS Legal Network (n 18) 4.

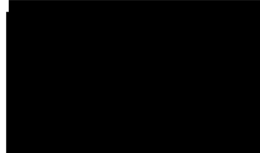
²³ Scott Burris et al, 'Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial' (2007) 39 *Arizona State Law Journal* 467; Keith J Horvath, Craig Meyer and BR Simon Rosser, 'Men Who Have Sex with Men Who Believe That Their State Has a HIV Criminal Law Report Higher Condomless Anal Sex than Those Who Are Unsure of the Law in Their State' [2016] *AIDS and Behavior* <<http://link.springer.com/10.1007/s10461-016-1286-0>>; Maya A Kesler et al, 'Prosecution of Non-Disclosure of HIV Status: Potential Impact on HIV Testing and Transmission among HIV-Negative Men Who Have Sex with Men' (2018) 13(2) *PLOS ONE* e0193269 ('Prosecution of Non-Disclosure of HIV Status'); Sophie E Patterson et al, 'The Impact of Criminalization of HIV Non-Disclosure on the Healthcare Engagement of Women Living with HIV in Canada: A Comprehensive Review of the Evidence' (2015) 18(1) *Journal of the International AIDS Society* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4689876/>>.

²⁴ NSW Law Reform Commission, *Consent in Relation to Sexual Offences: Consultation Paper* (2018) 60-61 [4.67].

6. Recommendation

While our focus in this submission has been on people with HIV, we note the potential of the draft section, given its broad and unconstrained language, to impact on other groups in possibly unforeseen but devastating ways.

NAPWHA and HALC strongly urge the Commission to revisit proposal 6.9 altogether, to remove it from the final recommendations, or to conduct a much more detailed and extensive consultation about its potential impact, before proceeding with proposal 6.9.



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